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Office of the Secretary

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *Fox Television Stations, Inc. Applications for Renewal
of Licenses of WNYW(TV) and WWOR-TV and
Supplement to Petition for Modification of Permanent
Waiver, Files Nos. BRCT-20070201AJS and BRCT-
20070201AJT, and MB Docket No. 07-260*

Dear Ms. Dortch:

By and through their counsel, Fox Television Stations, Inc. ("Fox") and News Corporation ("News Corp") hereby submit this brief response to the letters from Adrienne Biddings to the Commission reporting on *ex parte* meetings between Commission staff and representatives of the Office of Communication of United Church of Christ, Inc. ("UCC") in connection with the above-referenced matters.¹ During its meetings, UCC made certain representations to the Commission regarding the status of Fox's license renewal applications for WNYW(TV) and WWOR-TV, as well as Fox's and News Corp's request for waiver of the newspaper-broadcast cross-ownership ("NBCO") rule in the intensely competitive and diverse New York market. Fox and News Corp submit this letter to set the record straight with respect to the several incorrect or incomplete assertions contained in the UCC Letters.

¹ See Letters from Adrienne Biddings, Institute for Public Representation, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-260 (dated Oct. 16, 2009 and Oct. 30, 2009) (the "UCC Letters").

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In particular, Fox and News Corp strongly dispute the accuracy of the so-called "Fox Ownership Chronology" that UCC discussed at its October 15 meeting (and which was appended to one of the UCC Letters).² The chronology inexplicably omits several key facts, utterly ignores important steps taken by the Commission and the courts, and ultimately paints an exceedingly misleading picture of the history of Fox's and News Corp's efforts to seek relief from the NBCO rule – a rule that the Commission twice now has concluded abrogates the public interest. For example, even as UCC cites favorably to the decision of the U.S. Court of Appeals for the Third Circuit in the *Prometheus* case,³ the chronology makes no mention whatsoever of the fact that the court found that "reasoned analysis support[ed] the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."⁴ Collectively, this and other flaws so thoroughly undermine the validity of the UCC chronology that it simply should not be relied upon in making any substantive determinations about these proceedings. Attached hereto for the Commission's reference is a revised clean version of the chronology that corrects UCC's omissions and errors, together with a redline marked to show the changes.

Moreover, contrary to UCC's erroneous assertion, Fox and News Corp are and always have been in compliance with the NBCO rule, as it has been applicable to them based on Commission waivers. UCC disingenuously asserts that "although the FCC's approval of Fox's acquisition of WWOR in July 2001 had been conditioned on its compliance with the [NBCO rule] within 24 months, it has been more than eight years, and Fox still has not complied with the NBCO rule."⁵ In order to make this misguided claim, though, UCC totally disregards the facts. The reality is that when the Commission consented to Fox's acquisition of WWOR-TV, it specifically said that Fox would need to come into compliance with the NBCO rule only "*insofar as it is necessary under our rules at that time.*"⁶

² See UCC Oct. 16 Letter, at Attachment (consisting of the "Fox Ownership Chronology").

³ See *id.* at 2-3 (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus*").

⁴ *Prometheus*, 373 F.3d at 398.

⁵ UCC Oct. 16 Letter, at 1; see also UCC Oct. 30 Letter, at 1.

⁶ *In re Applications of UTV of San Francisco, Inc., et al. (Assignors) and Fox Television Stations, Inc. (Assignee)*, Memorandum Opinion & Order, 16 FCC Rcd 14975, ¶ 50 (2001) ("It is Further Ordered, That . . . [FTS] is granted a temporary 24-month period within which to come into

The Commission also noted that “[i]f our rules should change during that period to permit the proposed combination, then FTS and [K. Rupert Murdoch, News Corp’s chief executive officer] will not need to divest the [*New York Post* or one of the television stations to come into compliance.”⁷ As is clear from the corrected chronology, the NBCO rule *did* change during the intervening 24 months – the Commission voted to repeal the rule in June 2003.⁸ Furthermore, as UCC acknowledges, the Commission subsequently granted Fox and News Corp an additional temporary waiver in 2006 as part of the reorganization of Fox Television Holdings, Inc.⁹ And throughout the past 8 years, Fox and News Corp repeatedly and consistently have demonstrated both that this outmoded regulation should be repealed and that they are entitled to relief from its application in the nation’s most competitive and diverse media market. There is simply no basis for UCC’s implication that Fox has ignored or flouted the NBCO rule for any period of time.

In addition, UCC attempts to question Fox’s and News Corp’s basis for maintaining their ownership of WNYW(TV), WWOR-TV and the *New York Post* during the pendency of their requests for extension and modification of the waiver.¹⁰ Fox and News Corp filed with the Commission a letter in December 2008, prior to the scheduled expiration of the 2006 waiver, explaining that, since the Commission had not yet acted on the multiple pending filings, the “existing temporary waiver will remain in effect pending a Commission decision on the merits of their requests.”¹¹ The letter added that, “[s]hould there be any question about the status of their temporary waiver,” Fox and News Corp “request, out of an abundance of caution, a temporary extension of their waiver of the NBCO rule . . . to permit common ownership” of these three media outlets “while the FCC completes its review.”¹² Commission precedent makes clear that Fox’s and News Corp’s temporary waiver

compliance with the [NBCO rule] . . . *insofar as it is necessary under our rules at that time*”) (emphasis supplied).

⁷ *Id.* at ¶ 45 n.73.

⁸ *See In re 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 (2003) (rev’d and remanded, *Prometheus*, 373 F.3d at 372).

⁹ *See* UCC Oct. 16 Letter, at 1; UCC Oct. 30 Letter, at 1.

¹⁰ *See* UCC Oct. 16 Letter, at 2; UCC Oct. 30 Letter, at 1-2.

¹¹ Letter from Antoinette Cook Bush and Jared S. Sher, Counsel, Fox Television Stations, Inc. and News Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, BTCCT-20050819AAF, *et al.*, Status of Waiver (filed Dec. 24, 2008), at 2.

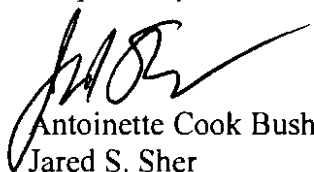
¹² *Id.*

“remain[s] in force” inasmuch as the Commission has not yet acted on their extension request or the modification petitions.¹³ Although UCC has “questioned the legal basis” for this precedent, it cites to no countervailing authority.¹⁴ UCC’s discomfort with the law notwithstanding, Fox and News Corp have not violated any Commission rule or requirement.

If there is one thing about which Fox and News Corp can agree with UCC, it is that these proceedings – together with Fox’s and News Corp’s various efforts to seek a final, permanent answer to the questions raised here – have been pending for far too long.¹⁵ Rather than suggest that an NBCO waiver in New York is unjustified as UCC alleges, however, the passage of time has served only to underscore that grant of the requested waiver would promote the public interest by preserving a diverse media outlet in an incredibly difficult economic environment for daily newspapers and television stations.

In short, there can be no doubt that in a market as diverse and competitive as New York, common ownership of WNYW(TV), WWOR-TV and the *New York Post* causes no public interest harms and should be permitted. Accordingly, Fox and News Corp again request that the Commission grant their waiver request and finally bring to a close this years-long proceeding.

Respectfully submitted,



Antoinette Cook Bush
Jared S. Sher

*Counsel to Fox Television Stations, Inc.
and News Corporation*

¹³ *In re Counterpoint Communications, Inc. (Transferor) and Tribune Television Co. (Transferee)*, 20 FCC Rcd 8582, 8590 (2005) (affirming the Media Bureau’s determination that the holder of an NBCO rule waiver “was ‘in full compliance’ with the Commission’s multiple ownership rules” while its request for a waiver extension was pending) (citing *Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. c/o R. Clark Wadlow, Esq.* (Sept. 5, 2003)).

¹⁴ UCC Oct. 16 Letter, at 2; UCC Oct. 30 Letter, at 1-2.

¹⁵ See UCC Oct. 16 Letter, at 2; UCC Oct. 30 Letter, at 2.

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Enclosures

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COMPLETE FOX OWNERSHIP CHRONOLOGY

- 1976** -News Corporation ("News Corp"), through a subsidiary distinct from Fox Television Stations, Inc. ("Fox"), purchased the *New York Post*.
- 1986** -Fox acquired WNYW, a television station located in the New York DMA, and pursuant to its 1985 license transfer, was given two years to divest its interests in the *New York Post*. *Metromedia Radio & Television, Inc.*, 102 FCC2d 1334 (1985).
- Mar. 1988** -Pursuant to the FCC's two year divestiture requirement, Fox sold the *New York Post* to real estate developer Peter S. Kalikow.
- 1993** -Fox reacquired the *New York Post* after Mr. Kalikow's financial difficulties led the paper's parent company to declare bankruptcy.
- Due to the lack of qualified purchasers or other viable alternatives that would ensure the survival of the newspaper, News Corp agreed to reassume management of the paper upon obtaining a permanent waiver of the newspaper/broadcast cross-ownership (NBCO) rule. Thus, Fox requested and received a permanent waiver of the NBCO rule to allow common ownership of the *New York Post* and WNYW. *Fox Television Stations Inc.*, 8 FCC Rcd 5341, 5354 (1993).
- Sept. 2000** -Fox proposed to acquire ten television stations from Chris-Craft Industries, Inc., including WWOR-TV, another television station located in the New York DMA.
- Fox argued that its 1993 permanent waiver should extend to its acquisition of WWOR-TV, or in the alternative, that it should receive an "interim waiver" until conclusion of the rulemaking proceeding that the Commission committed to initiate in the 1998 Biennial Regulatory Review of the Commission's broadcast ownership rules.
- UCC, Rainbow/PUSH, and others opposed Fox's acquisition of WWOR-TV.
- July 2001** -The Commission concluded "that it would be in the public interest to grant [Fox] a temporary 24-month period within which to come into compliance with the television/newspaper cross-ownership rule in the New York market . . .", but only "insofar as it is necessary under our rules at that time . . ." *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14989-14990 (2001) ("Chris-Craft Order"). In an unpublished opinion, the D.C. Circuit affirmed the FCC's ruling. It found that the FCC had made an adequate public interest finding to approve the transfer, noting that "[a]lthough Fox could not fully complete Form 314 because it required waivers, to the extent that Fox required these waivers, the Commission found that granting temporary waivers would serve the public interest, and, therefore, the acquisition was in the public interest." *Office of Commc'n of the United Church of Christ v. FCC*, 51 Fed. Appx. 21 (2002).

-The Commission rejected Fox's claim that the 1993 permanent waiver extended to the acquisition of WWOR-TV because a waiver granted during one set of market conditions "is not automatically extended to cover new combinations several years later under potentially changed market conditions." Chris-Craft Order, 16 FCC Rcd at 14977.

June 2003 -The Commission repealed the NBCO rule, finding that "neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market . . . nor a cross-service restriction on common ownership of radio and television outlets in the same market . . . remains necessary in the public interest"; the FCC replaced the rule with cross media limits allowing cross-ownership in most markets, including New York. *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003).

July 2003 -Absent the Commission's decision to repeal the NBCO rule, Fox's two-year temporary waiver would have expired on July 31, 2003. As the Commission said in the Chris-Craft Order, "[i]f our rules should change during [the 24 month waiver period] to permit the proposed combination, then FTS and Murdoch [News Corp's chief executive officer] will not need to divest the *Post* or one of the television stations to come into compliance." 16 FCC Rcd at 14990. Given that the rule had been repealed, Fox filed a letter with the Commission on July 21, 2003, seeking a temporary extension of the waiver to the extent necessary to permit the new ownership rules to go into effect.

Sept. 2003 -The Third Circuit stayed implementation of all the Commission's proposed new rules, ordering that the *status quo ante* remain in effect pending judicial review. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398, 435 (3d. Cir. 2004). At oral argument before issuing the stay, Judge Scirica specifically asked appellant's counsel: "A stay would not affect any of the temporary waivers?" Counsel responded: "It would effectively continue them." Judge Scirica followed: "It would effectively continue them, but it would not abrogate them?" Counsel replied: "That's correct." *Prometheus Radio Project et. al. v. FCC*, Case No. 03-3388, Transcript of Hearing on Motion to Stay, September 3, 2003, at 36.

July 2004 -The Third Circuit reversed the FCC's adoption of the cross media limits, but specifically found that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast crossownership was no longer in the public interest," that "the newspaper/broadcast cross-ownership ban undermined localism" and that the ban was not necessary to promote diversity; the court clarified that all of the old ownership rules would remain in effect pending judicial review of the FCC's decision on remand. *Prometheus*, 373 F.3d at 398-99, 435.

- Sept. 2004** -Fox and News Corp filed a “Petition for Modification of Permanent Waiver,” requesting that the Commission either modify their existing permanent waiver to permit common ownership of WWOR-TV, WNYW, and *The New York Post*, or to grant an additional temporary waiver until after the Commission’s action on remand from the 2002 Biennial Regulatory Review.
- Aug. 2005** -While its 2004 waiver request was pending, Fox sought FCC consent to undertake a corporate restructuring, necessitating the filing of a Form 315 transfer of control application, which detailed why the proposed recapitalization should have no bearing on the existing waivers of the NBCO rule permitting common ownership of the *Post* together with WNYW(TV) and WWOR-TV; a copy of the 2004 Modification Petition also was included as part of the application.
- Oct. 2006** -Almost three years after the FCC’s 2001 two-year waiver initially was set to expire for WWOR- TV, and more than three years after the FCC’s decision to repeal the NBCO rule, the FCC voted three to two to approve the corporate restructuring that transferred control of WWOR-TV and WNYW. *K. Rupert Murdoch, (Transferor) and Fox Entertainment Group (Transferee)*, 21 FCC Rcd 11499 (2006). The FCC has withheld the dissents of both Commissioners Adelstein and Copps.
- The FCC granted a new permanent waiver for WNYW and *The New York Post*, and granted a new 24-month temporary waiver permitting continued common ownership of WWOR-TV (which was scheduled to expire December 29, 2008). *Id.*
- The temporary waiver for WWOR-TV was granted to provide “sufficient certainty to assure that [Fox] and News Corp. will continue to take appropriate action or expend necessary capital to preserve and expand *The New York Post* without a concern that it would have to forfeit that investment by closing the newspaper or by a forced sale of a media interest at an artificially depressed price to achieve compliance with the multiple ownership rules” and “to ensure that the very purpose of the [NBCO] rule – to preserve competition and existing service to the public – is not disserved by a forced divestiture . . . in a market more than sufficiently competitive to withstand the harms that the rule was designed to prevent.” *Id.* at 11502.
- Nov. 2006** -The UCC and Rainbow/PUSH filed a petition for reconsideration with the FCC, asking it to reconsider and reverse its October 2006 Order; Fox filed an opposition to the petition.
- Feb. 2007** -Fox filed license renewal applications for WNYW and WWOR-TV. *See* http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.htm?context=25&appn=101167338&formid=303&fac_num=74197.
- May 1, 2007** -UCC and Rainbow/PUSH filed a petition to deny these applications.

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Nov. 28, 2007 -Media Bureau held public forum in Newark, NJ to receive public input regarding sufficiency of WWOR-TV's programming effort in New Jersey.

Feb. 2008 -The Commission released its order concluding the 2006 Quadrennial Review, "reaffirm[ing] [its] decision to eliminate the blanket ban on newspaper/broadcast cross-ownership . . .," and relaxing the NBCO rule and abandoning the cross-media limits adopted in 2003. The implementation of the Commission's relaxed NBCO rule is still under a stay pending the Third Circuit's review of the rule. *In re 2006 Quadrennial Review*, 23 FCC Rcd 2010, 2021 (2008).

-Although numerous licensees with outstanding license applications were referenced in the Commission's Order, Fox was not mentioned.

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May 22, 2009 -FCC released the order adopted Jan. 15, 2008, denying UCC's and Rainbow/PUSH's petition for reconsideration of the order granting consent to Fox's transfer of control. The Commission "reaffirm[ed] that our decision to renew the permanent waiver permitting ownership of WNYW-TV and the *New York Post* and to grant a temporary waiver permitting the further ownership of WWOR-TV was supported by the facts in the record and was in the public interest." See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion and Order on Reconsideration, FCC 08-15 (rel. May 22, 2009), at ¶¶ 13, 19.

July 15, 2009 -UCC, Rainbow/PUSH and Free Press filed an opposition to Fox's and News Corp's Supplement to Petition for Modification of Permanent Waiver.

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(2002). ~~The Commission granted the waiver in order to permit an orderly disposition of assets and avoid forced sales.~~ 16 FCCR at 14989.

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NBCO ownership rules would remain in effect pending judicial review of the FCC's decision on remand. *Prometheus*, 373 F.3d at 398-99, 435. ~~*Id.*~~
~~Fox still had made no efforts to come into compliance with the NBCO as the Commission ordered 3 years prior in July 2001.~~

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the permanent waiver permitting ownership of WNYW-TV and the *New York Post* and to grant a temporary waiver permitting the further ownership of WWOR-TV was supported by the facts in the record and was in the public interest." See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion and Order on Reconsideration, FCC 08-15 (rel. May 22, 2009), at ¶¶ 13, 19.

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Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:

	Count
Insertions	95
Deletions	70
Moved from	0
Moved to	0
Style change	0
Format changed	6
Total changes	171